

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Big Island Radio)	File Number: EB-03-HL-035
)	
Licensee of FM Broadcast Station KHWI)	NAL/Acct. No. 200432860002
Hilo, Hawaii)	FRN 0004979464

NOTICE OF APPARENT LIABILITY FOR FORFEITURE

Released: March 11, 2004

By the Honolulu Office, Enforcement Bureau:

I. INTRODUCTION

1. In this Notice of Apparent Liability for Forfeiture ("NAL"), we find that Big Island Radio, ("Big Island Radio") licensee of station KHWI(FM) in Hilo, Hawaii, has apparently repeatedly violated Sections 11.35(a) and 11.61 of the Federal Communications Commission's Rules ("Rules") by failing to conduct required weekly and monthly Emergency Alert System ("EAS") tests, and failing to determine the cause of the failures to receive the required EAS tests and log the reasons why the EAS tests were not received.¹ We conclude, pursuant to Section 503(b) of the Communications Act of 1934, as amended ("Act"),² that Big Island Radio is apparently liable for a forfeiture in the amount two thousand dollars (\$2,000).

II. BACKGROUND

2. On May 1, 2003, agents from the Honolulu Office monitored KHWI, 92.7 MHz, from 11:10 a.m. until 12:20 p.m. HST. During this period, KHWI did not retransmit the EAS Required Monthly Test ("RMT"), issued by the Hawaii Civil Defense at approximately 11:14 a.m. HST. Later that same day, the agents inspected the KHWI main studio at 688 Kinoole Street, Hilo, Hawaii. KHWI shared a single TFT EAS Encoder/Decoder unit with seven other radio stations, also owned by Big Island Radio. The shared EAS unit automatically activated seven of the eight stations. The eighth station, KHWI, was activated through a manual override switch on the EAS unit. The agents observed that the shared EAS unit was monitoring only a single source, NOAA/Civil Defense, at the time of inspection.

3. The EAS logs indicated that the May 1, 2003, RMT was successfully retransmitted for all of the stations sharing the unit, but the agents observed during monitoring that the RMT was not retransmitted by KHWI. The station's chief operator indicated the manual override for KHWI failed to occur on May 1, 2003. The EAS logs also revealed that the RMT was not received or retransmitted in

¹ 47 C.F.R §§11.35(a) and 11.61.

² 47 U.C.S. § 503(b).

March 2003, or April 2003, and EAS Required Weekly Tests ("RWT") were not received or conducted between January 2003, and April 2003. There were no EAS log entries to indicate that the cause of the failure to receive and conduct the required tests was investigated.

III. DISCUSSION

4. Section 503(b) of the Act provides that any person who willfully or repeatedly fails to comply substantially with the terms and conditions of any license, or willfully or repeatedly fails to comply with any of the provisions of the Act or of any rule, regulation or order issued by the Commission thereunder, shall be liable for a forfeiture penalty.³ The term "willful" as used in Section 503(b) has been interpreted to mean simply that the acts or omissions are committed knowingly.⁴ The term "repeated" means the commission or omission of such act more than once or for more than one day.⁵

5. The Rules provide that every AM and FM broadcast station is part of the nationwide EAS network and is categorized as a participating national EAS source unless the station affirmatively requests authority to not participate.⁶ The EAS provides the President and state and local governments with the capability to provide immediate and emergency communications and information to the general public.⁷ State and local area plans identify local primary sources responsible for coordinating carriage of common emergency messages from sources such as the National Weather Service or local emergency management officials.⁸

6. Section 11.35(a) of the Rules requires all broadcast stations to ensure that EAS encoders, EAS decoders and attention signal generating and receiving equipment is installed and operational so that the monitoring and transmitting functions are available during the times the station is in operation. Broadcast stations must also determine the cause of any failure to receive required monthly and weekly EAS tests, and must indicate in the station's log why any required tests were not received and when defective equipment is removed and restored to service.⁹ Section 11.61 of the Rules requires AM stations to (a) receive monthly EAS tests from designated local primary EAS sources and retransmit the monthly test

³ 47 U.S.C. § 503(b).

⁴ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'willful', when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act...." See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

⁵ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that "[t]he term 'repeated', when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day."

⁶ 47 C.F.R. §§ 11.11 and 11.41.

⁷ 47 C.F.R. §§ 11.1 and 11.21.

⁸ 47 C.F.R. § 11.18. State EAS plans contain guidelines that must be followed by broadcast and cable personnel, emergency officials and National Weather Service personnel to activate the EAS for state and local emergency alerts. The state plans include the EAS header codes and messages to be transmitted by the primary state, local and relay EAS sources.

⁹ 47 C.F.R. § 11.35(a) and (b).

within 60 minutes of its receipt and (b) conduct tests of the EAS header and EOM codes at least once a week at random days and times.¹⁰ The requirement that stations monitor, receive and retransmit the required EAS tests ensures the operational integrity of the EAS system in the event of an actual disaster. Based on the evidence before us, we find that Big Island Radio repeatedly violated Sections 11.35(a) and 11.61 of the Rules by failing to conduct required weekly and monthly EAS tests, and failing to determine the cause of the failures to receive the required EAS tests and log the reasons why the EAS tests were not received.

7. Pursuant to *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines* ("Forfeiture Policy Statement"),¹¹ the base forfeiture amount for failure to have EAS equipment installed or operational is \$8,000. The *Forfeiture Policy Statement* does not establish a base forfeiture amount for violating the Commission's rule requiring timely retransmission of the monthly EAS tests. Therefore we must determine what an appropriate amount should be for this violation.¹² The requirement that stations retransmit the monthly EAS tests is similar in both nature and severity to other required operational readiness checks. As failure to make measurements or conduct required monitoring carries a base forfeiture amount of \$2,000, pursuant to the *Forfeiture Policy Statement*, the base forfeiture amount for failure to retransmit EAS tests is set at \$2,000. In assessing the monetary forfeiture amount, we must also take into account the statutory factors set forth in Section 503(b)(2)(D) of the Act¹³, which includes the nature, circumstances, extent, and gravity of the violation(s), and with respect to the violator, the degree of culpability, and history of prior offenses, ability to pay, and other such matters as justice may require. Applying the *Forfeiture Policy Statement* and the statutory factors to the instant case, a \$2,000 forfeiture is warranted

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED THAT, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.111, 0.311 and 1.80 of the Commission's Rules, Big Island Radio, is hereby NOTIFIED of its APPARENT LIABILITY FOR A FORFEITURE in the amount of two thousand dollars (\$2,000) for violations of Sections 11.35(a) and 11.61 of the Rules.¹⁴

9. IT IS FURTHER ORDERED THAT, pursuant to Section 1.80 of the Commission's Rules, within thirty days of the release date of this NOTICE OF APPARENT LIABILITY, Big Island Radio SHALL PAY the full amount of the proposed forfeiture or SHALL FILE a written statement seeking

¹⁰ The required monthly and weekly tests are required to conform to the procedures in the EAS Operational Handbook. *See also, Amendment of Part 11 of the Commission's Rules Regarding the Emergency Alert System*, EB Docket No. 01-66, *Report and Order*, FCC 02-64 (Feb. 26, 2002); 67 Fed Reg 18502 (April 16, 2002) (effective May 16, 2002, the required monthly EAS test must be retransmitted within 60 minutes of receipt.).

¹¹ 12 FCC Rcd 17087 (1997), recon. denied 15 FCC Rcd 303 (1999).

¹² The fact that the *Forfeiture Policy Statement* does not specify a base amount does not indicate that no forfeiture should be imposed. The *Forfeiture Policy Statement* states that "any omission of a specific rule violation from the... [*Forfeiture Policy Statement*]...should not signal that the Commission considers any unlisted violation as nonexistent or unimportant." *Forfeiture Policy Statement*, 12 FCC Rcd at 17,099. *See e.g., American Tower Corporation*, 16 FCC Rcd 1282 (2001).

¹³ 47 U.S.C. § 503(b)(2)(D).

¹⁴ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0111, 0.311, 1.80, 11.35(a) and 11.61.

reduction or cancellation of the proposed forfeiture.

10. Payment of the forfeiture may be made by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Forfeiture Collection Section, Finance Branch, Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the NAL/Acct. No. and FRN No. referenced in the caption.

11. The response, if any, must be mailed to Federal Communications Commission, Enforcement Bureau, Spectrum Enforcement Division, 445 12th Street, S.W., Washington, D.C. 20554 and MUST INCLUDE THE NAL/Acct. No. referenced in the caption.

12. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting practices (“GAAP”); or (3) some other reliable and objective documentation that accurately reflects the petitioner’s current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

13. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Revenue and Receivables Operations Group, 445 12th Street, S.W., Washington, D.C. 20554.¹⁵

14. Under the Small Business Paperwork Relief Act of 2002, Pub L. No. 107-198, 116 Stat. 729 (June 28, 2002), the FCC is engaged in a two-year tracking process regarding the size of entities involved in forfeitures. If you qualify as a small entity and if you wish to be treated as a small entity for tracking purposes, please so certify to us within thirty (30) days of this NAL, either in your response to the NAL or in a separate filing to be sent to the Spectrum Enforcement Division. Your certification should indicate whether you, including your parent entity and its subsidiaries, meet one of the definitions set forth in the list provided by the FCC’s Office of Communications Business Opportunities (OCBO) set forth in Attachment A of this Notice of Apparent Liability. This information will be used for tracking purposes only. Your response or failure to respond to this question will have no effect on your rights and responsibilities pursuant to Section 503(b) of the Communications Act. If you have questions regarding any of the information contained in Attachment A, please contact OCBO at (202) 418-0990.

15. IT IS FURTHER ORDERED THAT a copy of this NOTICE OF APPARENT LIABILITY shall be sent by Certified Mail # 7001 0320 0002 9837 2291, Return Receipt Requested, to Big Island Radio, 2447 Makiki Heights Drive, Honolulu, Hawaii 96822.

FEDERAL COMMUNICATIONS COMMISSION

Ryan Hagihara
Resident Agent, Honolulu Office

¹⁵ See 47 C.F.R. § 1.1914.

FCC List of Small Entities

As described below, a “small entity” may be a small organization, a small governmental jurisdiction, or a small business.

(1) Small Organization	
Any not-for-profit enterprise that is independently owned and operated and is not dominant in its field.	
(2) Small Governmental Jurisdiction	
Governments of cities, counties, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand.	
(3) Small Business	
Any business concern that is independently owned and operated and is not dominant in its field, <i>and</i> meets the pertinent size criterion described below.	
Industry Type	Description of Small Business Size Standards
<i>Cable Services or Systems</i>	
Cable Systems	Special Size Standard – Small Cable Company has 400,000 Subscribers Nationwide or Fewer
Cable and Other Program Distribution	\$12.5 Million in Annual Receipts or Less
Open Video Systems	
<i>Common Carrier Services and Related Entities</i>	
Wireline Carriers and Service providers	1,500 Employees or Fewer
Local Exchange Carriers, Competitive Access Providers, Interexchange Carriers, Operator Service Providers, Payphone Providers, and Resellers	

Note: With the exception of Cable Systems, all size standards are expressed in either millions of dollars or number of employees and are generally the average annual receipts or the average employment of a firm. Directions for calculating average annual receipts and average employment of a firm can be found in 13 CFR 121.104 and 13 CFR 121.106, respectively.

<i>International Services</i>	
International Broadcast Stations	

International Public Fixed Radio (Public and Control Stations)	\$12.5 Million in Annual Receipts or Less
Fixed Satellite Transmit/Receive Earth Stations	
Fixed Satellite Very Small Aperture Terminal Systems	
Mobile Satellite Earth Stations	
Radio Determination Satellite Earth Stations	
Geostationary Space Stations	
Non-Geostationary Space Stations	
Direct Broadcast Satellites	
Home Satellite Dish Service	
Mass Media Services	
Television Services	\$12 Million in Annual Receipts or Less
Low Power Television Services and Television Translator Stations	
TV Auxiliary, Special Broadcast and Other Program Distribution Services	
Radio Services	\$6 Million in Annual Receipts or Less
Radio Auxiliary, Special Broadcast and Other Program Distribution Services	
Multipoint Distribution Service	
	Auction Special Size Standard – Small Business is less than \$40M in annual gross revenues for three preceding years
Wireless and Commercial Mobile Services	
Cellular Licensees	1,500 Employees or Fewer
220 MHz Radio Service – Phase I Licensees	
220 MHz Radio Service – Phase II Licensees	Auction special size standard - Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and controlling principals) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and controlling principals)
700 MHz Guard Band Licensees	
Private and Common Carrier Paging	
Broadband Personal Communications Services (Blocks A, B, D, and E)	1,500 Employees or Fewer
Broadband Personal Communications Services (Block C)	Auction special size standard - Small Business is \$40M or less in annual gross revenues for three previous calendar years Very Small Business is average gross revenues of \$15M or less for the preceding three calendar years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Broadband Personal Communications Services (Block F)	
Narrowband Personal Communications Services	
Rural Radiotelephone Service	1,500 Employees or Fewer
Air-Ground Radiotelephone Service	
800 MHz Specialized Mobile Radio	Auction special size standard - Small Business is \$15M or less average annual gross revenues for three preceding calendar years
900 MHz Specialized Mobile Radio	
Private Land Mobile Radio	1,500 Employees or Fewer
Amateur Radio Service	N/A
Aviation and Marine Radio Service	1,500 Employees or Fewer
Fixed Microwave Services	

Public Safety Radio Services	Small Business is 1,500 employees or less Small Government Entities has population of less than 50,000 persons
Wireless Telephony and Paging and Messaging	1,500 Employees or Fewer
Personal Radio Services	N/A
Offshore Radiotelephone Service	1,500 Employees or Fewer
Wireless Communications Services	Small Business is \$40M or less average annual gross revenues for three preceding years Very Small Business is average gross revenues of \$15M or less for the preceding three years
39 GHz Service	
Multipoint Distribution Service	Auction special size standard (1996) – Small Business is \$40M or less average annual gross revenues for three preceding calendar years Prior to Auction – Small Business has annual revenue of \$12.5M or less
Multichannel Multipoint Distribution Service	\$12.5 Million in Annual Receipts or Less
Instructional Television Fixed Service	
Local Multipoint Distribution Service	Auction special size standard (1998) – Small Business is \$40M or less average annual gross revenues for three preceding years Very Small Business is average gross revenues of \$15M or less for the preceding three years
218-219 MHZ Service	First Auction special size standard (1994) – Small Business is an entity that, together with its affiliates, has no more than a \$6M net worth and, after federal income taxes (excluding carryover losses) has no more than \$2M in annual profits each year for the previous two years New Standard – Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Satellite Master Antenna Television Systems	\$12.5 Million in Annual Receipts or Less
24 GHz – Incumbent Licensees	1,500 Employees or Fewer
24 GHz – Future Licensees	Small Business is average gross revenues of \$15M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates) Very Small Business is average gross revenues of \$3M or less for the preceding three years (includes affiliates and persons or entities that hold interest in such entity and their affiliates)
Miscellaneous	
On-Line Information Services	\$18 Million in Annual Receipts or Less
Radio and Television Broadcasting and Wireless Communications Equipment Manufacturers	750 Employees or Fewer
Audio and Video Equipment Manufacturers	
Telephone Apparatus Manufacturers (Except	

Cellular)	1,000 Employees or Fewer
Medical Implant Device Manufacturers	500 Employees or Fewer
Hospitals	\$29 Million in Annual Receipts or Less
Nursing Homes	\$11.5 Million in Annual Receipts or Less
Hotels and Motels	\$6 Million in Annual Receipts or Less
Tower Owners	(See Lessee's Type of Business)